A **SABAH MEDICAL CENTRE SDN BHD & ANOR**

v.

HOSPITALIA ACTIVHEALTH (L) GMBH & ORS (NO 2)

B HIGH COURT SABAH & SARAWAK, KOTA KINABALU
LINTON ALBERT J
[SUIT NO: K22-193 OF 2006]
14 MARCH 2007

C ***CIVIL PROCEDURE:*** *Injunction - Erinford injunction - Application pending appeal against dismissal of interim injunction - Whether new evidence adduced - Whether opposing party prejudiced*

This was the plaintiffs' application for Erinford injunction pending their appeal against the dismissal of their application for interim D injunction for stay of arbitration proceedings between the 1st plaintiff and the 1st defendant [See report on p. 165].

Held (granting the application):

E **(1)** It could not be said that the appeal was frivolous because the dismissal of the 1st defendant's application for interim injunction was based solely on the finding that there was unexplained and inordinate delay in filing the application. There was no change of circumstances and no new material evidence F adduced between the period of dismissal of the application for interim injunction and the application for the Erinford injunction. There would be no hardship to the 1st defendant by allowing the application. The monetary claim the 1st defendant sought to pursue in the arbitration proceedings was G merely deferred. (para 5)

Case(s) referred to:
Erinford Properties Ltd v. Cheshire County Council [1974] 2 All ER 448 ***(refd)***
Kilang Kosfarm Sdn Bhd v. Kosma Nusantara Bhd [2002] 3 CLJ 165 HC ***(refd)***

H *For the plaintiffs - Datin Marina Tiu (Mary Lee Chung Ching with her); M/s Lee & Kong*
For the defendants - Zulaiha Chiew (Christopher Thian with her) M/s Zahirshah & Zulaiha Chiew

Reported by Usha Thiagarajah
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JUDGMENT

Linton Albert J:

[1] The 1st plaintiff owns a medical centre in Kota Kinabalu Sabah. By an agreement dated 18 December 2000 called the Hospital Management Agreement (HMA), the 1st plaintiff engaged the 1st defendant to manage the medical centre. During the subsistence of the HMA the 1st plaintiff sold certain privately owned assets. The 1st defendant claimed to be entitled to twenty percent of the proceeds of sale amounting to RM17 million representing an incentive fee due to the 1st defendant under the HMA. The 1st plaintiff disputed the 1st defendant's entitlement to the incentive fee derived from the proceeds of sale of its privately owned assets which had nothing to do with the 1st defendant's management of the medical centre. The dispute led to the termination of the HMA which in turn triggered an additional claim of RM1.5 million by the 1st defendant under a clause in the HMA called the termination fee. The dispute relating to the incentive fee and the termination fee including various other smaller claims by the 1st defendant against the 1st plaintiff was referred to a single arbitrator pursuant to an arbitration clause under the HMA. During the course of the arbitration proceedings, the 1st plaintiff discovered through the testimony of one of the witnesses for the 1st defendant that there was a basis to include the plea of fraud in its defence and counterclaim and applied for an adjournment to reis amend the defence and counterclaim accordingly. The reamendment was subsequently allowed by the arbitrator in September 2006. There was nothing to indicate that the continuation of the arbitration proceedings which was fixed to begin on 1 November 2006 would not proceed and so preparations were made and preliminary proceedings conducted right up to 30 October 2006 to ensure that the continuation of the arbitration proceedings would continue as fixed. Unbeknown to the 1st defendant and the arbitrator, the 1st plaintiff had, jointly with the 2nd plaintiff who owned the majority shareholding in the 1st plaintiff filed a suit not only against the 1st defendant but three other defendants alleging fraud and seeking various declaratory reliefs, in particular challenging the arbitrator's jurisdiction to adjudicate on the dispute between the 1st plaintiff and the 1st defendant. Also on 30 October 2007, an application

was filed *ex parte* for an order restraining the 1st defendant from proceeding further with the arbitration proceedings until after the trial of the action by the plaintiffs. The restraining order was intimated to the 1st defendant and the arbitrator on the eve of the continuation of the arbitration proceedings which inevitably led to the discontinuance of the arbitration proceedings. The *ex parte* order was subsequently dissolved after an *inter partes* hearing on 17 November 2006. The plaintiffs appealed against that decision and filed the instant application for an Erinford injunction restraining the 1st defendant from further proceeding with the arbitration proceedings pending the final determination of the plaintiffs' appeal.

[2] In *Erinford Properties Ltd. v. Cheshire County Council* [1974] 2 All ER 448, the plaintiffs' motion for an interlocutory injunction was dismissed but the plaintiffs subsequently obtained a limited injunction on the same terms pending their appeal against the dismissal. This was what Megarry J. said at p. 454:

> ... where the application is for an injunction pending an appeal, the question is whether the judgment that has been given is one on which the successful party ought to be free to act despite the pendency of an appeal. One of the important factors in making such a decision, of course, is the possibility that the judgment may be reversed or varied ...
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> ... I cannot see that a decision that no injunction should be granted pending the trial is inconsistent, either logically or otherwise, with holding that an injunction should be granted pending an appeal against the decision not to grant the injunction, or that by refusing an injunction pending the trial the judge becomes *functus officio* quoad granting any injunction at all.
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> There may, of course, be many cases where it would be wrong to grant an injunction pending appeal, as where any appeal would be frivolous, or to grant the injunction would inflict greater hardship than it would avoid, and so on. But subject to that, the principle is" ... when a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful, is not nugatory." ... it was on that principle, and not because I felt any real doubts about my judgment on the motion, that I granted counsel for the plaintiffs the limited injunction pending appeal that he sought. This is not a case in which damages seem to me to be a suitable alternative.

[3] It was contended for the 1st plaintiff that unless there was a limited injunction pending the disposal of its appeal to the Court of Appeal against the decision refusing its application to restrain the 1st defendant from pursuing its claim to the incentive and termination fees in the arbitration proceedings pending the determination of the suit against the 1st defendant, its appeal would be rendered nugatory. The 1st plaintiff's contention was premised on the fact that the nucleus of the issues in the action against the 1st defendant was whether the fraud ascribed to the defendants rendered the HMA null and void which in turn would negate not only the incentive and termination fees and other miscellaneous charges claimed by the 1st defendant but also the very arbitration proceedings on those claims, which the 1st defendant was intent on pursuing to its ultimate conclusion. Therefore, regardless of the financial standing of the 1st defendant or its lack of assets, damages would be woefully inadequate if the 1st plaintiff were to succeed in its appeal because by then the arbitration proceedings would in all probability be concluded. Clearly, the nugatory aspect of the 1st plaintiffs argument was, in the circumstances, well-founded. It was unnecessary, therefore, to speculate on the outcome of the arbitration proceedings at its conclusion or the dire consequences that would befall the 1st plaintiff if an award was made in favour of the 1st defendant.

[4] I found it neither useful nor appropriate to embark on a judicial scrutiny of the disparate issues raised in the instant application is founded on the numerous authorities cited. I found it particularly unhelpful to resort specifically to judicial pronouncement in authorities relating to stay of execution because here, there was no order to be executed by the 1st defendant; the instant application had to be tested as an original application. (See *Kilang Kosfarm Sdn Bhd. v. Kosma Nusantara Bhd.* [2002] 3 CLJ 165). In determining whether to allow or refuse an application for Erinford injunction it is sufficient to go into the established parameters set out in the judgment of Megarry J. in the *Erinford* case reproduced above. It was not necessary to go beyond that except it must be borne in mind that it was an exercise of judicial discretion and factors that militated against the exercise of the discretion to grant the Erinford injunction must be considered. There was none.

[5] It could not be said that the appeal was frivolous because the dismissal of the 1st defendant's application for interim injunction was based solely on the finding that there was unexplained and inordinate delay in filing the application. The element of fraud which constituted the basis for seeking a declaration that the HMA was null and void was not plucked out of thin air but discovered from the testimony of one of the witnesses who testified on behalf of the 1st defendant at the arbitration proceedings. Therefore, it was of no consequence that there was no change of circumstances and no new material evidence adduced between the period of the dismissal of the application for interim injunction and the application for the Erinford injunction. Reliance by learned counsel for the 1st defendant on the *Kilang Kosfarm* case where an Erinford injunction was refused on that basis, was misplaced. In allowing the limited injunction there was no is greater hardship inflicted than it would otherwise be the case if it was refused because determination of the purely monetary claim the 1st defendant sought to pursue in the arbitration proceedings was merely deferred and it was not suggested that the delay would have ominous consequences to the 1st defendant. In the circumstances and for the reasons aforesaid, I allowed the application for the Erinford injunction.